

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN MYERS,

Defendant-Appellant.

UNPUBLISHED

August 5, 2010

No. 291896

Wayne Circuit Court

LC No. 2007-007179-01-FC

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced to serve a term of 20 to 60 years' imprisonment, on each count, with the sentences to run concurrently. We affirm.

Defendant was charged in the instant matter when his former girlfriend's daughter advised police that he had touched her inappropriately when she was approximately nine years old. The complaining witness testified that defendant resided with her, her mother, and her brother for a period of time in approximately 1991. According to the complaining witness, defendant had sexual contact with her on two occasions, several months apart, during that time period. One of the incidents involved digital penetration of the complaining witness by defendant. Shortly after the incidents occurred, the complaining witness began residing with her father and did not see defendant again.

The complaining witness never told anyone about the incidents until 1999 (when she was approximately 16 years old), when she reported the incidents to the police. By that time, her mother was deceased and the complaining witness had no knowledge of where defendant could be located. The police attempted to locate defendant, but were unsuccessful due to the complaining witness being unable to provide them with the proper spelling of defendant's name, and the case became inactive. In 2007, the complaining witness found information about defendant on a website and forwarded the information to the police. The police located defendant and arrested him shortly thereafter.

At trial, the complaining witness provided specific testimony about the two incidents of sexual contact. Over defendant's objections, defendant's now-adult daughter, J.G., also testified concerning incidents where defendant had sexually assaulted her during her younger years. The assaults took place when defendant was residing with J.G. and her mother, and one of the

assaults involved digital penetration by defendant. Defendant was ultimately convicted as charged and now appeals as of right.

On appeal, defendant first contends that MCL 768.27a, which allowed for the admission of J.G.'s testimony, conflicts with MRE 404(b), thus rendering the statute unconstitutional. We disagree.

This Court reviews a challenge to a statute's constitutionality de novo. *People v Hrlic*, 277 Mich App 260, 262; 744 NW2d 221 (2007). The trial court's decision to admit "other acts" evidence is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCL 768.27a provides, in relevant part:

. . . in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant . . .

(2) As used in this section:

(a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.¹

MRE 404(b), on the other hand, provides that, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

Defendant argues that MCL 768.27a conflicts with MRE 404(b) and, because the Michigan Supreme Court has the exclusive authority to prescribe rules governing court practice and procedure, is an unconstitutional infringement on the Supreme Court's exclusive rulemaking authority. This Court considered and rejected this argument in *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007). In *Pattison*, this Court determined that while the legislature may not enact a rule that is purely procedural, MCL 768.27a does not violate the principles of separation of powers because it is not merely procedural. Rather, it "is a substantive rule of evidence" and ". . . because the statute in question does not represent an attempt by the legislature to regulate the operation of the courts, it follows that the legislature was operating within its constitutionally granted powers." *Id.* at 619-620. See also, *People v Watkins*, 277 Mich App 358; 745 NW2d 149 (2007).

Defendant also contends that MCL 768.27a is an unconstitutional ex post facto law. *Pattison*, also, however, previously rejected this argument:

¹ Defendant does not contest that he was charged with a "listed offense" as defined by MCL 768.27a.

In many cases, [MCL 768.27a] allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context. However, the altered standard does not lower the quantum of proof or value of the evidence needed to convict a defendant. . . and the application of MCL 768.27a to this case does not violate the Ex Post Facto Clause.

Because the doctrine of stare decisis and the Michigan Court Rules obligate us to adhere to *Pattison's* analysis of these issues, defendant's constitutional claims lack legal merit. MCR 7.215(J)(1), *People v Herrick*, 277 Mich App 255, 258; 744 NW2d 370 (2007).

Moreover, MCL 768.27a allows for the admission of evidence concerning other listed offenses against a minor, and such evidence may be considered for its bearing on any relevant matter. Defendant was charged with MCL 750.520b(1)(a), which is a listed offense, and the conduct described by J.G. constitutes the same offense. J.G.'s testimony, if believed, tends to make defendant's alleged conduct in the instant matter more probable and tends to show that the victim was telling the truth when she alleged that defendant had committed sexual offenses against her. The evidence was thus relevant for purposes of MCL 768.27a. See *People v Mann*, ___ Mich App __; ___ NW2d ___ (Docket No. 288329, issued April 8, 2010).

Defendant next argues that if MRE 404(b) controls, J.G.'s testimony was inadmissible. However, because "MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)," *People v Pattison*, 276 Mich App at 618-619, we need not engage in a 404(b) analysis.

Defendant next claims that J.G.'s testimony should have been excluded pursuant to MRE 403 because the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. We disagree.

According to MRE 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

"The fact that evidence is prejudicial does not make its admission unfair." *People v Murphy (On Remand)*, 282 Mich App 571, 582-583; 766 NW2d 303 (2009). "Unfair prejudice exists only where either a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect or it would be inequitable to allow the proponent of the evidence to use it." *Id.* at 583 (internal quotations omitted).

The challenged evidence was more than marginally probative to rebut defendant's general denial that he was responsible for the charged offense. Defendant took advantage of another young victim, one with whom he also resided and with whom he had a father-daughter relationship. The evidence about incidents involving J.G. was highly probative to show that

defendant engaged in sexually inappropriate behavior with a young child when opportunity presented itself in the form of a residential situation where he would be entrusted with the young girls. And, as explained in *People v Mann*, __ Mich App __:

Whether the minors in this case were telling the truth had significant probative value because it underlies whether Mann should be convicted of the crimes for which he was charged. Further, the trial court specifically instructed the jury on two occasions that the only purpose for which the evidence could be considered was to help them judge the believability of the testimony regarding the acts for which Mann was on trial. And jurors are presumed to follow their instructions. . . we conclude that the trial court did not abuse its discretion in allowing admission of evidence that Mann previously committed another listed offense against a minor.

Here, as in *Mann*, defendant's propensity to commit these types of acts was highly probative to the charged offenses. Since the probative value of the evidence was so high, defendant has failed to show how the jury would have given such evidence any undue weight. Further, as in *Mann*, the trial court gave the jury a cautionary instruction regarding J.G.'s testimony. The trial court stated:

You've heard evidence that was introduced to show that the defendant, Mr. Myers, has engaged in improper sexual conduct for which the defendant is not on trial for.

If you believe this evidence you must be very careful to consider it for only one limited purpose. That is, to help you judge the believability of the testimony regarding the acts or act for which the defendant is now on trial. You must not consider this evidence for any other purpose.

For example, you must not consider—you must not decide that it shows that the defendant is a bad person or that the defendant is likely to have committed the crimes. You must not convict Mr. Myers here because you think he's guilty of other bad conduct. Do you all understand that?

We agree with the analysis set forth in *Mann*. And, despite the fact that any evidence concerning a prior sexual contact with a child would be prejudicial to defendant, MCL 768.27a nevertheless allows the admission of such evidence. Defendant's MRE 403 argument fails.

Finally, defendant contends that where it was revealed after the jury rendered its verdict that a juror belonged to a union of which the complaining witness's father was the vice-president, he is entitled to a new trial. We disagree.

Defendant moved for a new trial before the trial court on the above basis, which the trial court denied. This Court reviews for an abuse of discretion the trial court's decision on a motion for a new trial and for clear error its findings of fact. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when the result is outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Here, the jury foreperson indicated during jury selection that he did not recognize the names of any identified potential witnesses. However, after the verdict of guilty was rendered, the trial judge spoke to the jury and a juror indicated that he knew the complaining witness's father. On the record, the trial court questioned the juror concerning his relationship with the complaining witness's father and the juror stated that the father is the vice-president of the union to which the juror belongs. The juror further explained that he did not know the father on a personal basis but knew his name and had seen him before. The juror stated that he did not recognize his name when he was identified as a potential witness prior to trial, but when the father walked into the courtroom and after all testimony was completed, he recognized him. The juror testified that the familiarity with the father did not have any bearing on his decision in the case and that he would have convicted defendant regardless.

A criminal defendant has the right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; see, also, *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). “[J]urors are presumed to be . . . impartial, until the contrary is shown. The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt.” *Id.* at 550 (internal citation and quotation marks omitted). Moreover, the defendant must show that actual prejudice resulted from the presence of an allegedly impartial juror to justify a new trial. *Id.* at 548-549.

Contrary to defendant's assertion otherwise, a juror's failure to disclose information that the juror should have disclosed is only prejudicial if it denied the defendant an impartial jury. “[Defendants] are not entitled to a new trial unless the juror's failure to disclose denied [the defendants] their right to an impartial jury.” *Id.* And, as observed in *Miller*, even if a juror would have been excusable for cause, a new trial is not always required because the proper inquiry is whether defendant was denied his right to an impartial jury. *Id.* In this case, we agree with the trial court that defendant has not overcome the presumption of impartiality.

The connection between the juror and the complaining witness's father was remote. The juror specifically testified that he recognized the father only when he saw his face, and did not know him personally. There is no indication that the juror deliberately misrepresented whether he recognized the names of any potential witnesses prior to trial, and defendant has offered no evidence to demonstrate that he was prejudiced by the juror's presence on his jury. That is, defendant has offered no evidence to establish that the juror was partial or that this juror improperly affected any other jurors. Again, the juror testified that his recognition of the complaining witness's father did not affect his deliberations whatsoever, and specifically stated that he would have convicted defendant in any event. Based on the foregoing, we are satisfied that the trial court did not clearly err in ruling that defendant had not demonstrated that he was actually prejudiced by the juror's presence on his jury, and did not abuse its discretion in denying defendant's motion for a new trial based upon juror misconduct.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Deborah A. Servitto